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No. 86-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. HECHENBERGER,

Petitioner,

VS.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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No. 86-57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. HECHENBERGER,

Petitioner,

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

1. The district court assumed arguendo that petitioner was the prevailing party; that is, that his action was the causative factor in respondents' abandonment. Both panels recognized that the change in Missouri law was not fully curative even in Missouri: the first, because ERISA supercession; the second, because the later state statute had only prospective effect.

2. The district court did not conduct a *Hensley*-type[1] analysis. The Eighth Circuit recognized that the real reason for the trial court's later denial of fees was petitioner's first appeal. Respondents' suggestion that it was appropriate that the trial court consider only what motions petitioner had lost, not the motions or relief petitioner had won, is inconsistent with *Hensley*. The result of the lawsuit was that petitioner retained $9,000 in benefits that petitioner had previously been threatened with losing, not an insignificant amount for an injured worker. Moreover, both panels of the court of appeals believed respondents' representations that the (pervasive) integration practice and respondents' three-state practice of threatening integration, had been adandoned. Had that been true, the result was tremendous.

3. Respondents treat petitioner's request for multiple remedies as if each was a separate unrelated claim. In the instant case there is only a single transactional fact, a single claim, that of wrongful integration. *Hensley, supra,* doesn't call for the court to analyze each remedy request; rather it relates to success on separate claims. See *Bruno v. Western Electric Co.,* 618 F.Supp. 398 (D.C. Cal 1985) (fees not reduced when plaintiff received less relief than sought, where underlying transaction factually the same on all issues). In *Evans v. Jeff D.,* 106 S.Ct. 1531 (1986), this Court anticipated plaintiffs would seek many forms of relief. See also *City of Riverside v. Rivera,* 54 Law Week 4845, 4846 n.1 (1986) (although plaintiffs requested injunctive relief as well as damages, plaintiffs assumed court would not grant injunction).

4. Although the law is clear that employers can engage in self-help to "correct" state legislative interference with plan terms because ERISA supercession, *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981), respondents advise that the instant

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[1] *Hensley v. Eckerhart,* 461 U.S. 424 (1983).

"case need never have been brought." Petitioner's argument forces lone beneficiaries threatened with plan violation and benefit reduction, to await correction by their states even if, as in this case, correction took years.[2]

ERISA was intended to assure that a lone individual could proceed even if he had not yet been harmed. 29 U.S.C. §1132(a)(1)(B) ("to clarify his rights to future benefits"). See also *Janowski v. Teamsters Local 710 Pension Fund,* 673 F.2d 931, 935 (7th Cir. 1982) (plaintiffs need not yet have a claim for determination); *Lechner v. National Benefit Fund,* 512 F.Supp. 1220 (D.C. N.Y. 1981) (suit allowed by non-claimant to prevent possible future violations). Cf. *Int'l Ass'n of Bridge etc. v. Douglas,* 646 F.2d 1211 (7th Cir. 1981) (suit allowed under ERISA challenging plan amendment that might affect unspecified future participants); *Watts v. Boyd Properties, Inc.,* 758 F.2d 1482 (11th Cir. 1985) (standing conferred on individual motivated solely by desire to challenge legality of alleged misconduct under 42 U.S.C. §1982 that would harm others).

5. Respondents have asked this Court to consider the district court's never-published 1984 and 1985 decisions in *Wilken v. AT&T Technologies, Inc.,* No. 83-2198-C(3) (E.D. Mo.).

(a) *Wilken, supra,* was instituted only *after* petitioner had appealed.

(b) In *Wilken, supra,* the district court on December 4, 1984 found that respondents' practice of some ten years, violated both the anti-integration provisions of the benefits plan and respondents' ERISA Section 404 fiduciary duties, 29 U.S.C. §1104. It would only order correction for 104

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[2] Petitioner's action served as a stimulant to later state action for later-injured workers. The second panel noted there was no legislative correction for petitioner. Respondents abandoned before they learned of legislative action; the record shows the decision to abandon was unrelated to any legislative action.

beneficiaries in Missouri, a correction amounting to some $150,000.00.

(c) Although that plaintiff (Wilken) used the discovery petitioner paid for and the fruits of the labor of petitioner's attorney, in its April 5, 1985 decision the district court expressly allowed nothing toward petitioner's costs and fees; they were to remain unreimbursed and unrecompensed.

(d) From the fact that the district court allowed Wilken's attorney $95 an hour, the fee amount respondents' report reveals just how much — over 600 hours — a beneficiary and his attorney must persevere to overcome countless efforts at defense even after the respondents' purported abandonment in the instant case.

With such resistance beneficiaries, unaided by their collective bargaining representative, will rarely offer to "take on" their employer and their benefits plan even if they were to discover respondents' error. Cf. *Teamsters Local No. 145 v. Kuba,* 631 F.Supp. 1063 (D.C. Conn. 1986) (no assurance abuses would come to attention of persons who could remove the trustees or sue for fiduciary violation unless union allowed to have role); *Rosario v. Cook County,* 101 FRD 659, 662 (N.D. Ill. 1983) ("Courts have noted frequently employees are reluctant to bring their employers into court.").

(d) Although Wilkens did present a "live" controversy, Wilken lost employment with respondents. Thus Wilken had no personal reason to further seek removal for pervasive wilful fiduciary misconduct or to pursue correction for former fellow beneficiaries in New York and Colorado after the district court barred them from the class.

Moreover instead of petitioner's single suit, if ever New York or Colorado beneficiaries were to find out about

defendants' misconduct, as did Wilken from petitioner's counsel, the courts would be faced with four class suits instead of one, a total waste of judicial energy. Cf. *EEOC v. FLRA*, 106 S.Ct. 1678 (1986).

Petitioner had standing to appeal. If ERISA is to be enforced, it was an abuse of discretion to deny petitioner the benefits of a full *Hensley*-type analysis because petitioner had initially appealed for broader relief including that of the right to seek attorneys' fees, the latter point having been sustained by the first panel.

Respectfully submitted,

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